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Final Regulation Agency Background Document

Agency name	Department of Medical Assistance Services
Virginia Administrative Code (VAC) citation	12VAC30, Chapter 120
Regulation title	Waiver Services
Action title	Elderly/Disabled Combined with Consumer Direction Waiver
Document preparation date	

This information is required for executive review (www.townhall.state.va.us/dpbpages/apaintro.htm#execreview) and the Virginia Registrar of Regulations (legis.state.va.us/codecomm/register/regindex.htm), pursuant to the Virginia Administrative Process Act (www.townhall.state.va.us/dpbpages/dpb_apr.htm), Executive Orders 21 (2002) and 58 (1999) (www.governor.state.va.us/Press_Policy/Executive_Orders/EOHome.html), and the *Virginia Register Form, Style, and Procedure Manual* (http://legis.state.va.us/codecomm/register/download/styl8_95.rtf).

Brief summary

In a short paragraph, please summarize all substantive changes that are being proposed in this regulatory action.

The Elderly and Disabled (E&D) waiver was DMAS' first waiver program beginning in the early 1980's. It provided coverage in the community for adult day health care, respite care, and personal care services to consumers who, in the absence of these support services, would otherwise have required institutionalization in nursing facilities. The Consumer-Directed, Personal Attendant Services (CD-PAS) waiver program was developed in 1997 in response to community requests. This waiver allowed consumers to have greater control over the receipt of personal care services by permitting them to hire/fire their attendants and determine attendants' work hours within the approved number of hours. The combining of these two waivers is resulting from the specific request of consumers and family/caregivers. With the combining of these two waivers, recipients will have more options of service delivery models for their care. Recipients will now be able to choose consumer-directed (service delivery model) personal assistance services for more than 42 hours of care each week if their needs indicate more hours of service are required and/or up to 720 hours per calendar year of respite care services. A consumer may also choose to receive consumer-directed and agency-directed care simultaneously as long as the service hours do not exceed the approved care plan hours.

Statement of final agency action

Please provide a statement of the final action taken by the agency including (1) the date the action was taken, (2) the name of the agency taking the action, and (3) the title of the regulation.

I hereby approve the foregoing Agency Background Document with the attached regulations 12VAC30-120-10 through 12VAC30-120-60 and 12VAC30-120-490 through 12VAC30-120-550 (repealed) and 12VAC30-120-900, et seq. (added) and adopt the action, Elderly/Disabled Combined with Consumer Direction Waiver, stated therein. I certify that this final regulatory action has completed all the requirements of the Code of Virginia § 2.2-4012, of the Administrative Process Act and is full, true, and correctly dated.

_____ Date

_____ Patrick W. Finnerty, Director
Dept. of Medical Assistance Services

Legal basis

Please identify the state and/or federal source of legal authority to promulgate this proposed regulation, including (1) the most relevant law and/or regulation, including Code of Virginia citation and General Assembly bill and chapter numbers, if applicable, and (2) promulgating entity, i.e., the agency, board, or person. Describe the legal authority and the extent to which the authority is mandatory or discretionary.

The *Code of Virginia* (1950) as amended, § 32.1-325, grants to the Board of Medical Assistance Services the authority to administer and amend the Plan for Medical Assistance. The *Code of Virginia* (1950) as amended, § 32.1-324, authorizes the Director of DMAS to administer and amend the Plan for Medical Assistance according to the Board's requirements. The Medicaid authority as established by § 1902 (a) of the *Social Security Act* [42 U.S.C. 1396a] provides governing authority for payments for services.

Purpose

Please explain the need for the new or amended regulation by (1) detailing the specific reasons why this regulatory action is essential to protect the health, safety, or welfare of citizens, and (2) discussing the goals of the proposal and the problems the proposal is intended to solve.

This regulatory action combines the E&D Waiver (12 VAC 30-120-10 et seq.) with the CD-PAS Waiver (12 VAC 30-120-490 et seq.). The new combined waiver (12VAC30-120-900 et seq.) will offer agency-directed personal assistance, agency-directed respite, consumer-directed personal assistance, consumer-directed respite, adult day health care, and personal emergency response systems.

Substance

Please identify and explain the new substantive provisions, the substantive changes to existing sections, or both where appropriate. A more detailed discussion is required under the "All changes made in this regulatory action" section.

The sections of the regulations affected by this action are: 12VAC30-120-10 through 12VAC30-120-60 (E&D Waiver regulations) and 12VAC30-120-490 through 12VAC30-120-550 (CD-PAS Waiver regulations) are being repealed. DMAS will use the 12VAC30-120-900, *et seq.* for the new waiver program.

Elderly and Disabled Waiver

The Elderly and Disabled Waiver was DMAS' first waiver program beginning in the early 1980's. At its outset, it provided coverage in the community for adult day health care, respite care, and personal care services to consumers who, in the absence of these support services, would otherwise have required institutionalization in nursing facilities. More recently, the coverage of Personal Emergency Response Systems (PERS) was added to this waiver.

The adult day health care provided for waiver consumers to attend group activities at adult day care facilities while their family members were otherwise employed. Personal care services provided support for the basic activities of daily living (ADLs) such as bathing, eating, toileting, transferring, and dressing. Respite care provided temporary relief for the primary care persons so they could take vacations and otherwise have brief breaks from their primary care responsibilities. PERS places personal emergency response systems (emergency call systems) into the homes of consumers, who must remain alone for long periods each day, and reduces the need for on-site aide or assistant care. All of these services have been rendered by home health agencies and personal care providers. Annually, approximately 10,000 to 12,000 persons have been served by this waiver.

Consumer-Directed Waiver

The Consumer-Directed waiver program was developed in 1997 in response to community requests. This waiver allowed consumers to have greater control over the receipt of personal care services by permitting them to hire/fire their attendants and determine attendants' work hours within the approved number of hours. This enabled disabled adults to set their own work schedules and fostered the pursuit of careers and educational opportunities. This waiver program has typically served only a small population, approximately 100 persons.

Since its implementation, there has been a tremendously positive impact on, and response from, consumers. This positive impact is important because, during the waiver's development, health care industry professionals raised several significant concerns regarding these regulations. Some consumers have reported that by utilizing consumer-directed services, there has been less personal care staff turnover, greater flexibility in meeting their schedules and preferences, and greater satisfaction with the way the personal assistants perform their duties.

Concerns, raised when DMAS began developing this consumer-directed program, focused on personal assistant standards and qualifications, and appropriate and adequate supervision of the plan of care. There were concerns that using assistants, who would not be required to have formal nurse aide training, would engage in fraudulent, abusive, and neglectful behaviors. Another concern was that a Registered Nurse (RN) would not complete the assessment,

develop the plan of care, or be involved in the assistant's supervision. Consumers argued that such RN oversight was not needed and that they (the consumers) are aware of their own needs and are capable of addressing these needs. Some critics also predicted more hospitalizations for these consumers due to the absence of RN care. None of these concerns have materialized to date.

Combined Waiver

Under the former E&D waiver, in order for an individual to be eligible for services they had to be at imminent risk of being placed in a nursing facility. The combined waiver does not have this criterion; it is replaced under the new waiver with the requirement that the individual require a nursing facility level of care.

All waiver programs must meet the federal cost effectiveness standard -- the cost of the individual participant's community care, in the aggregate, cannot exceed their institutional costs of care. This same standard applies to services under the combined waiver. Under the new combined waiver all services are available to all clients. Because all services are still limited by medical necessity under the new combined waiver, DMAS projects no cost increase for services. Combining the two waivers simplifies waiver administration and is more cost effective for DMAS. Therefore, while remaining cost effective, the new waiver enables clients greater freedom to choose to direct their own personal care and respite services, to choose agency-directed care for all their services, or a combination of the two.

With the implementation of this regulatory change, the E&D Waiver services (agency-directed personal care, agency-directed respite, adult day health care, and personal emergency response systems) will be combined with the CD-PAS Waiver services (consumer directed personal assistance and consumer directed respite). This new regulation outlines the requirements for the services the providers must follow in order to receive reimbursement from the DMAS.

The combining of these two waivers is resulting from the specific request of consumers and family/caregivers. With the combining of these two waivers, recipients will have more options of service delivery models for their care. Recipients will now be able to choose consumer directed (service delivery model) personal assistance services for more than 42 hours of care each week if their needs indicate more hours of service are required. A consumer may also choose to receive consumer-directed and agency-directed care simultaneously as long as the service hours do not exceed the approved care plan hours.

Issues

Please identify the issues associated with the proposed regulatory action, including:

- 1) the primary advantages and disadvantages to the public, such as individual private citizens or businesses, of implementing the new or amended provisions;*
- 2) the primary advantages and disadvantages to the agency or the Commonwealth; and*
- 3) other pertinent matters of interest to the regulated community, government officials, and the public.*

If the regulatory action poses no disadvantages to the public or the Commonwealth, please so indicate.

The primary advantage of combining these two waivers is to provide recipients more options of service delivery for care. Recipients will be afforded the opportunity to choose consumer

directed personal assistance and can combine consumer-directed and agency-directed care as long as the blended service hours do not exceed amounts allotted in approved plans of care. There are no disadvantages to the public or the Commonwealth with these regulations.

Changes made since the proposed stage

Please describe all changes made to the text of the proposed regulation since the publication of the proposed stage. For the Registrar’s office, please put an asterisk next to any substantive changes.

DMAS made changes described below based upon both public comment and the Agency’s experience with the combined waiver program subsequent to the implementation date. The following changes are being made in the final regulation.

Section number	Requirement in proposed regulation	Proposed change in final regulation and rationale
12 VAC 30-120-900	No definition of “primary caregiver.”	Add definition of “primary caregiver.”
12 VAC 30-120-920(B)(5)	Providers must submit all required information to the designated preauthorization contractor within 10 business days of initiating care.	Adding the phrase, “or within ten business days of receiving verification of Medicaid eligibility from the local DSS” to permit greater flexibility in submitting the required information.
12VAC30-120-930(H)	Requirement that provider notify the preauthorization contractor and DMAS upon certain events.	Add “local DSS” to the list of entities to notify upon certain events.
12VAC30-120-930(I)(1)	The individual or person responsible for supervising the individual’s care shall discuss the decrease in care with the individual or family/caregiver, document the conversation in the individual’s record, and notify the designated preauthorization contractor and the individual or family of the change by letter.	The individual or person responsible for supervising the individual’s care shall discuss the decrease in care with the individual or family/caregiver, document the conversation in the individual’s record, and notify the designated preauthorization contractor. The preauthorization contractor will notify the individual or family of the change by letter. [The one sentence is separated into two with the additional phrase “The preauthorization contractor will notify” at the beginning of the second sentence.
12VAC30-120-930(I)(2)	Any increase to an individual’s plan of care that exceeds the number of hours allowed for that individual’s level of care or any change in the individual’s level of care must be preauthorized by DMAS or the designated preauthorization.	Any increase to an individual’s plan of care that exceeds the number of hours allowed for that individual’s level of care or any change in the individual’s level of care must be preauthorized by DMAS or the designated preauthorization contractor [and be accompanied by adequate documentation justifying the increase. The phrase “and be accompanied by adequate documentation justifying the increase” was added to the end of the sentence.
12 VAC 30-120-950 (B)(3)(h)(3)(i)	No requirement that aide be 18 years of age or older.	Add requirement that aide be 18 years of age or older.
12VAC30-120-960(C)(2)	The personal care provider shall: 2. Employees . . .	The word “hire” was added: The personal care provider shall: 2. Hire employees . . .
12VAC30-120-960(C)(3)(b)	“from a consumer-directed services”	“A” was deleted: “from consumer-directed services”
12VAC30-120-960(C)(4)(g)	No requirement that aide be 18 years of age or older.	Add requirement that aide be 18 years of age or older.

12VAC30-120-960(D) and 12VAC30-120-970(D)	"nonhome"	"non-home" [Hyphen was added.]
12 VAC 30-120-970(B) and 12 VAC 30-120-990(A) and (B)(2)	Respite care services available only for primary caregivers living in the home	Remove the requirement that primary caregivers be living in the home in order to receive respite care services
12 VAC 30-120-980(D)(1)	<u>"A unit of service is one-month rental price is set by DMAS."</u>	<u>A unit of service [is equals] one-month rental [price of PERS, the price of which] is set by DMAS.</u>
12 VAC30-120-970(C)(4)(f) and 12 VAC 30-120-990(D)(10)(h)	Under agency-directed respite care services and under consumer-directed respite and personal assistance services, the requirement stated that individuals who are minors or the individuals' spouses cannot receive such services	Changed the language as follows to clarify: <u>individuals who are minors or minor children who are receiving waiver services or spouses of individuals who are receiving waiver services. the individuals' spouses.</u>
12VAC30-120-990(A)(4), 12VAC30-120-990(D)(2)(a)(5), and 12VAC30-120-990(D)(8)	"CD Service Facilitator"	"S" was added and phrase changed to "CD Services Facilitator."
12VAC30-120-990(D)(10)(h)	Receive periodic tuberculosis (TB) screening, cardiopulmonary resuscitation (CPR) training and an annual flu shot (unless medically contraindicated).	The personal care provider is still required to receive periodic tuberculosis (TB) screening, but the requirements for cardiopulmonary resuscitation (CPR) training and an annual flu shot (unless medically contraindicated) were deleted from the regulation.
12 VAC 30-120-900 and --990	References to Va. Code 37.1-183.3 concerning barrier crimes.	These referenced were corrected to 32.1-162.9:1

Public comment

Please summarize all comment received during the public comment period following the publication of the proposed stage, and provide the agency response. If no public comment was received, please so indicate.

DMAS' proposed regulations were published in the October 3, 2005, *Virginia Register* for their public comment period from October 3, 2005 through December 2, 2005. The Agency received separate comments from two representatives of the Rockbridge Community Services Board. It was unclear whether these comments were generated by the publication of the proposed regulations regarding the Elderly & Disabled with Consumer Direction; however, the Agency is treating them as public comments on this package. Both comments concerned disregarded earned income for individuals working either between eight and twenty hours per week or more than twenty hours per week. Both comments expressed concern that the proposed regulations contain no income disregard for individuals working less than eight hours per week. The comments both stated that the absence of an income disregard for a less than eight hour work week for the group covered by this waiver program is problematic because longer work hours are especially difficult for this population. This policy creates a disincentive for this group to take on any employment, since, in effect, it penalizes a recipient for working less than eight hours per week, even if that is all they can accomplish.

DMAS Response: The absence of any income disregard for less than eight hours of work per week is a component of all the home and community-based waiver programs. While the Agency takes this policy under advisement, any change must be made to all home and community-based waiver programs, not only the Elderly & Disabled with Consumer Direction Waiver. As such, this suggested change will not be made in the final regulation.

The Agency also received comments from The Endependence Center (“The Center”) in Virginia Beach, Virginia. The Center requested that DMAS remove language from 12 VAC 30-120-920(B)(5), that DMAS requires a provider to submit certain information to the preauthorization contractor within ten business days of initiating care. The Center expressed concern that this requirement differs from the practice under the former Consumer-Directed Waiver program.

The Center expressed concern over the requirement described in 12 VAC 30-120-920 (B)(8) that recipients reside within the boundaries of the Commonwealth, with an exception for short periods of time for vacation or illness. The Center believes this requirement will be burdensome and require approval for almost any activity requiring the recipient to leave the Commonwealth.

The Center requested that DMAS remove from 12 VAC 30-120-990 the requirement that the primary caregiver live in the home with the recipient in order to receive respite services. The Center also requested that DMAS remove from this section language prohibiting personal care aids from assisting enrolled individuals with functions related to “post-secondary school functions.” Lastly, The Center requested that DMAS remove the requirement from (D)(10)(h) of this section that consumer-directed personal care aides receive periodic Tuberculosis screening, CPR training and an annual flu shot.

DMAS Response: Concerning the ten-day information submission requirement, DMAS is changing 12 VAC 30-120-920(B)(5) to add in flexibility allowing the provider to submit the required information within ten days of receiving verification of Medicaid eligibility from DMAS’ eligibility contractor.

In response to The Center’s concern over residency requirements in 12 VAC 30-120-920 (B)(8), DMAS points out that this section refers to residency in the Commonwealth only, and does not prohibit leaving the Commonwealth for random events or social occasions. Therefore DMAS does not intend to make any changes in this section.

Concerning The Center’s request that DMAS remove the requirement that the primary caregiver live in the home with the recipient in order to receive respite services, DMAS is making this change and incorporating the definition of “primary caregiver” in the Definitions section in 12 VAC 30-120-900. With regard to The Center’s request concerning “post-secondary school functions,” DMAS declines to make this change because this section does not prohibit the aid from assisting the enrolled individual with functions that are personal in nature. Finally, in response to The Center’s request to omit the requirements for consumer-directed personal care aides to have periodic Tuberculosis screening, CPR training and an annual flu shot, the Agency intends to drop the requirements for CPR training and the annual flu shot, but elects to retain the requirement for periodic TB screening, as the Agency believes TB screening to be a vital health concern in dealing with this population.

All changes made in this regulatory action

Please detail all changes that are being proposed and the consequences of the proposed changes. Detail new provisions and/or all changes to existing sections.

The following changes were carried over from the emergency regulation, through the proposed and in this final regulation.

Current section number	Proposed new section number, if applicable	Current requirement	Proposed change and rationale
12VAC30-120-10 through 12VAC30-120-60		E&D Waiver regulations	Repealed and merged into new waiver.
12VAC30-120-490 through 12VAC30-120-550		CDPAS Waiver regulations	Repealed and merged into new waiver.
	12VAC30-120-900, <i>et seq.</i>		New regulations combining the consumer directed services with Elderly & Disabled waiver services.

Family impact

Please assess the impact of the proposed regulatory action on the institution of the family and family stability.

These changes do not strengthen or erode the authority or rights of parents in the education, nurturing, and supervision of their children; or encourage or discourage economic self-sufficiency, self-pride, and the assumption of responsibility for oneself, one’s spouse, and one’s children and/or elderly parents. It does not strengthen or erode the marital commitment. The affect on disposable family income of this change is unknown.